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No. 04-473

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT, CAROL NAJERA AND COUNTY OF LOS ANGELES,
Petitioners,

v.

RICHARD CEBALLOS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS AND CALIFORNIA PROSECUTORS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a prosecutor who speaks on a matter of public concern by reporting suspected police misconduct to his superiors lose his First Amendment protection against retaliation by his employer solely because he communicated his message while performing his job?

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INTEREST OF *AMICI CURIAE*[1]

The Association of Deputy District Attorneys is an independent employee organization comprised of Deputy District Attorneys employed by the District Attorney of the County of Los Angeles. The California Prosecutors Association promotes policies, candidates and initiatives on behalf of front line prosecutors in California. *Amici* have an interest in protecting the federal constitutional rights of their members, including the right to speak on matters of public concern without retaliation by their employers. Prosecutors are sometimes in a position to detect wrongdoing by law enforcement officers. *Amici* submit that when a prosecutor uses appropriate channels to air suspicions or evidence of perceived wrongdoing, pursuant to a reasonable, good-faith belief that such statements are required by law, his speech is protected by the First Amendment, so long as the interest in the speech is not outweighed by evidence of a legitimate need by the public employer to "promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." *Connick* v. *Myers*, 461 U.S. 138, 150-151 (1983) (quotation omitted).

SUMMARY OF ARGUMENT

The decision below correctly applied this Court's First Amendment cases. Respondent appropriately asserted a cause of action based upon a violation of the First Amendment, as elucidated in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) and *Connick* v. *Myers*, 461 U.S. 138 (1983). Those cases establish that where, as here, a government employee speaks "as a citizen on matters of public concern" rather than "as an employee on matters only of personal in-

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, no attorney for any party has authored this brief in whole or in part. No person or entity, other than the *amici curiae*, their members and their counsel, has made any monetary contribution to the preparation or submission of the brief.

terest," *Connick*, 461 U.S. 147, the employee's speech receives protection, subject to a court's separate finding that such protection is not outweighed by a legitimate need of the government to regulate the integrity or operations of its workplace. Here, Respondent did not speak "as an employee on matters *only* of personal interest." In contrast—he reasonably concluded in good faith that ongoing prosecutions of criminal defendants were proceeding on the basis of false evidence and determined that the ethical duties that apply to him as a prosecutor licensed by the California bar required him to express this speech. He aired these conclusions using appropriate channels within his Office and in the courts.

Petitioners propose a *per se* rule—that any speech by a government employee that is performed in the course of discharging his job duties receives *no* First Amendment protection, even where the speech is on a matter of public concern, contributes meaningfully to the public debate of an issue concerning the integrity of the criminal justice system, and the government employer presented no evidence that could support a conclusion that the employee's speech was insubordinate, reflected incompetence, or otherwise compromised the integrity or operations of the office. This proposal is contrary to this Court's precedents. Moreover, the adoption of such a rule would naturally result in chilling of speech that is integral to the effective functioning of our justice system. It also would place a prosecutor on the horns of a dilemma when faced with a choice between taking actions in good faith to comply with ethical rules that, if found breached, could deprive him of his license and subjecting himself to demotion or loss of employment for discussing wrongdoing by one's law enforcement colleagues.

STATEMENT OF THE CASE

Richard Ceballos has been a Deputy District Attorney for the Office of the District Attorney in Los Angeles since 1989. JA 7. In late 1997 or early 1998, he was assigned to the Pomona branch office. JA 8. Approximately a year later, he was promoted to calendar deputy, a position of

prestige within the Office. JA 24. Calendar deputies oversee all of the cases handled by the Office in a particular judge's courtroom and supervise the trial deputies working there. JA 24-25. In that capacity, Ceballos reviewed any of the Office's cases coming in to that courtroom for arraignment,[2] made plea bargain offers, and attempted to settle the cases. JA 9. He also handled preliminary motions and discovery. *Id.* When it appeared that a case was not going to settle, he would assign it to one of the trial deputies who reported to him. *Id.*

Once a case was assigned, Ceballos would supervise the deputy handling it and assist him or her in preparation for trial, if necessary. JA 9. Beyond handling all of the cases in a courtroom, and representing the Office to a particular judge, the calendar deputy mentors the junior deputies he supervises, teaching them how to be good prosecutors. JA 25.

In February 2000, Ceballos was approached by Richard Escobedo, an attorney for one of the defendants in *People* v. *Cuskey*, a narcotics case that had been assigned to one of the deputies under Ceballos's supervision. JA 28-30. Escobedo said that he believed that one of the arresting deputy sheriffs lied in the affidavit he swore out to obtain a search warrant. JA 28. He wanted Ceballos to review the case, as a prosecutor with more experience than the trial deputy. *Id.* Ceballos agreed to look into the matter. JA 30.

After reading the file, reviewing the affidavit and the search warrant, and reviewing photographs and videotape of the search premises, Mr. Ceballos noticed an "obvious difference" between the property description in the warrant and the property as it appeared in the photos and video. JA 32. He then personally visited the property and spoke with the affiant. JA 34-35. Based on this review and personal investigation, Ceballos had serious reservations about the

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[2] Ceballos was not responsible for reviewing certain types of cases that were assigned to special units. JA 9.

veracity of the affidavit. JA 36.[3] Back at the office, he talked to his colleagues, showing them photographs and, in some cases, videotape. All of them agreed that the warrant was troublesome. JA 39. He showed videotape to his direct supervisor Carol Najera and to Head Deputy District Attorney Frank Sundstedt, and they too agreed with Ceballos that there was a problem with the warrant. *Id.*

Ceballos concluded that the search warrant had been supported by a false affidavit. Indeed, Ceballos believed, after interviewing the affiant, that the deputy sheriff had committed perjury. JA 112. He looked to see if there was "any other possibility to justify the search warrant under any other exception," but he concluded that there was no way to proceed on the case without the warrant. JA 48. Ceballos understood that prosecutors are bound by "ethical constraints" (JA 53) that require prosecutors to make an "independent decision as to whether or not to go forward with [a] case" (JA 47). He concluded that the case had to be dismissed, and he set forth this recommendation in a memorandum to Sundstedt. JA 40, 495-502. The memorandum was intended to serve as disposition report that would explain the reason for the dismissal of the case, if the case were dismissed. JA 41.

Sundstedt was "extremely concerned" with the import of Mr. Ceballos's observations in the memorandum (JA 112), but he asked Ceballos to make the memorandum less accusatory in tone because he planned to send it to the Sheriff's Department to explain why the case was going to be dis-

[3] The search warrant claimed probable cause to believe a stolen vehicle had been driven off the defendant's property, by representing the existence of "tire tracks" appearing to match those on the stolen vehicle along a "long driveway" leading to defendant's house. JA 498. The "driveway" was, in fact, a residential street housing nine residences in addition to defendant's. JA 499. The road was constructed of a combination of materials that did not appear conducive to maintaining discernable tire tracks along its complete distance—a fact that Ceballos himself tested by driving his SUV on the road. JA 500.

missed. JA 41. Ceballos made all of the requested changes.[4] Sundstedt signed off on the March 2, 2000 Memorandum and had it faxed to the Sheriff's Department. JA 43. The Captain of the Sheriff's Department demanded a meeting with the Office prior to the dismissal of the case. JA 27. Sundstedt agreed to a meeting, but communicated his view that there was "a problem with this case." JA 113, 182.

Ceballos advised Sundstedt that one of the *Cuskey* defendants was in custody following entry of a guilty plea. JA 44, 496. Sundstedt took the extraordinary step of authorizing Ceballos to obtain the convicted defendant's release from County Jail pending the meeting with the Sheriff's Department. *Id.* At the hearing concerning the release, Ceballos explained to defense counsel what he was doing and why (JA 54), specifically that he had recommended dismissal of the case based on his investigation of the site and discussions with Petitioners, but that dismissal would not occur prior to a meeting with the Sheriff's Department.[5]

At the ensuing meeting with the Sheriff's Department, Ceballos was verbally attacked by the Department's representatives. One of the lieutenants complained to Sundstedt and Najera that Ceballos was "not a prosecutor" and was

[4] Sundstedt made handwritten changes on Ceballos's original memorandum. This initial draft was destroyed after Ceballos had made the requested edits. JA 42.

[5] Ceballos's sworn testimony concerning his disclosures to defense counsel occurred at pages 114-117 of his deposition, in the portion represented by ellipses on page 54 of the Joint Appendix. Ceballos explained to Escobedo that "after going to the locations, after doing the research, after speaking with the detective, and after meeting and conferring with ... Najera and ... Sundstedt, that we were going to dismiss the case." Later, when the decision had been made not to dismiss the case, Ceballos advised Escobedo of this fact, but did not tell him anything else, including anything about his March 2 Memorandum. *Id.* at 117.

This testimony contradicts the unsupported assertion of *amicus* National Association of Counties that Ceballos "communicat[ed] protected work product to defense counsel." Nat'l Ass'n of Counties Br. 26. *Amici* will lodge these pages of the deposition if the Court so requests.

"acting more like a public defender" and requested that Ceballos be taken off of the case. JA 45. The captain said he wanted *Cuskey* to go forward because he was afraid the indicted defendant would file a lawsuit against the department. JA 49. At the meeting, the affiant was not questioned about the veracity of his statements and provided no information that caused Ceballos to revisit his conclusion that the information in the affidavit was false. JA 48-49. Nonetheless, Sundstedt indicated at the conclusion of the meeting that the Office would not dismiss the case prior to the hearing on the search warrant, but would allow the issue to be decided by the judge. JA 50-51, 183.

Ceballos informed Najera before the hearing on defendant's motion challenging the search warrant that he believed that the March 2, 2000 Memorandum and a subsequent memorandum should be disclosed to defense counsel pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). JA 55. Najera instructed him to prepare a new memorandum instead that contained only the statements of the detective who had prepared the affidavit, omitting all other information, including the *facts* Mr. Ceballos learned as a result of his investigation of the record and the site. *Id.* Ceballos responded that he believed the appropriate action would be to disclose the memoranda, with redactions to protect the District Attorney's work product. JA 56. He felt that creating a new memorandum would be misleading because defense counsel would never "have had any idea that there was other information that was contained in the original memos or that there was even original memos" and informed Najera that he did not believe the creation of a new memorandum was ethical. *Id.* Najera consulted with others in the office and ultimately approved provision of the redacted memoranda to defense counsel. JA 419.

Ceballos was subpoenaed in his individual capacity by defense counsel to appear at the motion on the search warrant. JA 53. According to Ceballos, Najera made a veiled threat that he would face retaliation if he testified truthfully that, in his opinion, the sheriff's deputies had lied. JA 57-58.

Mr. Ceballos testified at the hearing (JA 158), although the trial court sustained several relevance objections raised by respondent Najera (JA 296-300).

Not long after these events, Ceballos was demoted from the position of calendar deputy and transferred to an inconvenient branch of the office, after he refused a further demotion to handle misdemeanors in the Pomona Branch. JA 185-186. One of his murder cases was reassigned to a prosecutor who had no murder trial experience and he was not assigned any further murder cases. JA 186-187.

ARGUMENT

I. CEBALLOS'S MEMORANDUM WAS CITIZEN-SPEECH THAT ADDRESSED A MATTER OF GRAVE PUBLIC CONCERN

A. Perjured Police Testimony Is Of Intrinsic Interest To The Public

Under the First Amendment, public employees have the right to engage in speech "on matters of public concern" without fear of retaliation by their employers. *Connick* v. *Myers*, 461 U.S. 138, 145 (1983). To determine whether speech is related to a matter of public concern, the Court looks to the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-148. Here, Ceballos's communication addressed possible police perjury, an issue of obvious interest to the public. This Court has noted that exposure of possible misuse of government power is critical to the functioning of a democracy. *New York Times Co.* v. *United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring, joined by Douglas, J.). The speech at issue in this case involves matters in which the public has intense interest.

The district court acknowledged "the intrinsic and important public interest in excluding perjured evidence from court proceedings," but held that the "mere significance" of the issue did not establish that Ceballos's memorandum setting forth the facts on which he based his conclusion that the affidavit contained falsehoods addressed an issue of public concern for First Amendment purposes because Ceballos

"wrote it as part of his job." Pet. App. 62. The court appeared to acknowledge that this result might be surprising to the people of Southern California, where "police misconduct is a matter of great political and social concern to the community" in light of the then-recent police scandal, known as "Rampart," in Los Angeles. *Id.*

Rampart was one of the worst police scandals in American history. *Report of the Rampart Independent Review Panel*, Executive Summary 1 (Nov. 16, 2000), *available at* http://www.lacity.org/oig/rirprpt.pdf ("Rampart Independent Review Panel Report"). The exposure of widespread criminal activity by Rampart officers occurred a mere six months before Ceballos's involvement in *Cuskey*. A detailed understanding of the scandal and the environment in which it occurred is essential to appreciate the degree to which this issue was at the forefront of public debate in Los Angeles in early 2000, to understand the obstacles that prosecutors face in exposing such misconduct, and to comprehend the dramatic realization by prosecutors of the consequences that could ensue if they are not vigilant in pro-actively monitoring the veracity of evidence offered by law enforcement personnel.

In the mid-1980s, in response to an increase in violent gang-related street crime and drug trafficking in the Rampart neighborhood, the Los Angeles Police Department ("LAPD") formed and deployed a branch of its anti-gang unit there. This unit, called "Community Resources Against Street Hoodlums," or "CRASH," operated with wide latitude and "developed an independent subculture . . . where the ends justified the means. [The Rampart CRASH officers] resisted supervision and control and ignored LAPD's procedures and policies." *Id.* As a result of this "independent subculture" and inadequate leadership and supervision, police officers in the Rampart CRASH unit committed numerous incidents of perjury, evidence-planting, theft, beatings and brutality, and drug-dealing.[6] As the Independent Review Panel noted, these acts, and the organizational gaps from which they arose, "severely impacted the credibility of the entire criminal justice system in Los Angeles." *Id.* at 2.

Three separate criminal events in the late 1990s involving Rampart CRASH officers led to the LAPD's investigation of Rampart CRASH and the ultimate formation of the LAPD Rampart Task force.[7] First, in November 1997, Rampart CRASH officer David Mack robbed a bank. Second, in February 1998, three LAPD officers in the Rampart CRASH unit detained a man and demanded information relating to gang activity. When the man refused to cooperate, the officers beat and choked him until he vomited blood. The officers attempted to cover-up the incident but were implicated when the victim checked into a hospital and conveyed the story while being treated.

Third, and most significant, in March 1998, the LAPD Property Division discovered the theft of three kilograms of cocaine from the LAPD Property room. Suspicion for the theft soon focused on Rampart CRASH officer Rafael Perez, who had close personal connections to David Mack. An investigation revealed that Perez had checked out three kilograms of cocaine under the name of another officer. In August 1998, the District Attorney brought charges against Perez for this theft. It was soon discovered that Perez had stolen more than eight pounds of cocaine from the LAPD and that he was involved in the sale or distribution of this cocaine. Ultimately, Perez pleaded guilty to the drug

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[6] Rafael Perez, an officer whose acts and revelations were central to the Rampart Scandal, has further alleged that police officers shot and killed unarmed suspects. *Id.* at 5.

[7] *LAPD Board of Inquiry into the Rampart Area Corruption Incident* (Mar. 1, 2000), at 1-3, *available at* http://www.lapdonline.org/pdf_files/pc/boi_pub.pdf ("LAPD Board of Inquiry Report"); *see also* Peter J. Boyer, *Bad Cops: Rafael Perez's Testimony on Police Misconduct Ignited the Biggest Scandal in the History of the L.A.P.D. Is It the Real Story?*, The New Yorker, May 21, 2001, at 60.

charges, confessed to shooting an unarmed suspect and planting a gun on him, and agreed to expose other secrets and "dirty" cops in the Rampart division in exchange for a reduced term on the drug charges and immunity for the shooting of the suspect. LAPD Board of Inquiry Report 4; *see also* Boyer, *supra* n.7

The information conveyed by Rafael Perez led to the discovery of extensive corruption and criminality throughout the Rampart CRASH unit. The officers "routinely and unnecessarily . . . beat suspects in an effort to intimidate the gangs that the officers were charged with policing." Stanley A. Goldman, *Running From Rampart*, 34 Loy. L.A. L. Rev. 777, 783 n.22 (2001). Many suspects were the victims of "plants," where guns or drugs were planted upon them in order to cover-up police brutality and murder. Officers then committed perjury, resulting in convictions (often, guilty pleas) on the basis of phony evidence.[8] Ultimately, more than 100 defendants had their convictions overturned because of alleged criminal conduct on the part of the LAPD. Matt Lait and Scott Glover, *The Rampart Scandal*, L.A. Times, Aug. 11, 2003, at 1. At least eight officers were convicted of crimes arising out of their activities in the Rampart CRASH unit. *Id.* Ultimately, the U.S. Department of Justice entered into a consent decree with the LAPD, requiring extensive reforms. Scott Glover and Matt Lait, *LAPD Settling Abuse Scandal*, L.A. Times, Mar. 31, 2005, at A1.

Much of the investigative work necessary to unearth the truth behind police misconduct in Rampart was done by a deputy district attorney named Richard Rosenthal.

[8] As just one example, two Rampart CRASH officers were involved in three cases where they claimed suspects spit drugs out of their mouths while being apprehended. In all three cases, DNA evidence conclusively excluded this possibility, indicating that this pair had an established practice of planting phony evidence and perjuring themselves at trial. *See* Gary C. Williams, *Incubating Monsters?: Prosecutorial Responsibility for the Rampart Scandal*, 34 Loy. L.A. L. Rev. 829, 830 (2001) (citing Matt Lait and Scott Glover, *DNA Evidence in 4 Drug Cases Refutes Officers*, L.A. Times, Apr. 26, 2001, at A1).

Rosenthal prosecuted Perez in his initial trial and was involved in securing Perez's confessions. Without Rosenthal's persistence and willingness to speak out about this misconduct, the Rampart scandal may never have come to light. Rosenthal faced documented obstacles in doing so: once the scope of his investigation broadened beyond Perez himself to the entire LAPD, Rosenthal noticed that the LAPD "wanted this scandal over and they would do anything they could to make it end." Lait and Glover, *The Rampart Scandal*, *supra*. Investigators were met with a "code of silence," and evidence suggested that the LAPD purposefully understaffed the investigations into its own members. *Id.* Understandably, prosecutors have since reported that they are "afraid of being blackballed or labeled by officers and superiors who challenge their assessments." *See* Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 638 (2001) ("Chemerinsky Report").[9]

Petitioners' *amicus* assures the Court that if job-related speech by public employees is not protected, the "potential loss of contributions to the public debate . . . is at best minimal." Int'l Municipal Lawyers Ass'n Br. 13. But the findings from the Rampart investigation demonstrate that the potential loss is enormous. Foreclosing federal constitu-

[9] Another then-contemporaneous incident in Los Angeles bears mentioning. Evan Freed, a city attorney, suspected that testimony by police officers relating to a defendant's possession of a gun at the scene of a crime was phony. Upon visiting the crime scene, Freed noted that the officers could not possibly have seen a gun in the defendant's hand from their position at the scene. After reporting his conclusions to the court, the judge dismissed the charges and suggested that the District Attorney's Office notify the LAPD of the perjury. Freed was later fired. For a more detailed account of this incident, *see* Matt Lait and Scott Glover, *Two from LAPD Indicted in Alleged Framing of Suspect; Police: Pair Face Federal Charges They Falsely Claimed Man Had a Gun. Case is not Connected to Rampart Scandal but Could Affect U.S. Inquiry into Rights Abuses*, L.A. Times, Apr. 6, 2000, at A1; Williams, *supra* n.8, at 834.

tional protection for prosecutors who voice suspicions of misconduct would materially increase the disincentive to investigate possible misconduct that is already present in the law enforcement culture. Prosecutors who develop suspicions of misconduct will understand that the Constitution would offer *no* protection from termination or demotion if an ensuing investigation resulted in a disagreement with superiors about whether misconduct occurred or should be disclosed. Moreover, if such a disagreement were to ripen, the prosecutor could be placed in the untenable position of either ignoring his good faith belief that ethics laws required him to take action or by taking that action at his peril. Under these circumstances, the lack of constitutional protection would surely, even if subconsciously, affect the willingness of prosecutors to examine critically their suspicions. Prosecutors wishing to remain safe in their jobs would avoid any "knowledge" of misconduct that they would be ethically required to disclose if suspicions were confirmed, simply by burying their heads in the sand. Given that prosecutors are relatively more likely than the general public to develop legitimate suspicions given their repeated exposure to the work of the law enforcement investigators and access to all the evidence in a record of a particular case or set of cases, it is in the public interest that they be able to propose investigation of—and, where necessary, expose—official misconduct without fear of retaliation. *See* Pet. App. 12 ("The right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees ... are positioned uniquely to contribute to the debate on matters of public concern." (internal quotations omitted)).

It is not sufficient to say, as do the United States and the International Municipal Lawyers Association, that public employees who suspect misconduct in the course of performing their jobs will not be deterred from investigating or reporting it due to the existence of anti-retaliation laws passed in the states. First, states are free to withdraw such laws altogether, circumscribe coverage of certain classes of employees, or limit relief to particular types of retaliation.

Moreover, by revoking First Amendment protection *per se*, state employees would be relegated to obtaining redress from state agencies or courts that sometimes lack detachment from, or are even directly beholden to, the very public employers that are engaged in the alleged retaliation.

B. Ceballos Spoke "As A Citizen Upon A Matter Of Public Concern"

In *Connick*, the Court contrasted speech "as a citizen upon matters of public concern," which is presumptively protected, with speech "as an employee upon matters *only* of personal interest," which is not. 461 U.S. at 147 (emphasis added). Accordingly, the cases focus initially on whether the speech at issue arises out of, or is motivated by, purely personal matters, such as personnel grievances or personal animus. In those instances, no presumptive protection is afforded and employers need make no showing that their interest as an employer outweighs the employee's interest in speech. Here, Petitioners do not claim that Ceballos sought to further a personal interest, nor do they contend that Ceballos's speech arose out of or reflected a general personnel grievance with his superiors. It is undisputed that his purpose was to expose wrongdoing by law enforcement officers. Pet. App. 10.

When the speech is not purely personal, presumptive constitutional protection turns on whether it involves speech "as a citizen upon matters of public concern." *Connick*, 461 U.S. at 147. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement ...." *Id.* at 147-148. Public employees may speak as citizens upon matters of public concern by "speak[ing] out freely" in a public setting on questions for which "free and open debate is vital to informed decisionmaking," *Pickering*, 391 U.S. at 571-572, or by privately communicating issues "of general concern" about the workplace. *Connick*, 461 U.S. at 148 n.8 (discussing *Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)).

As discussed above, the content of Ceballos's speech concerned potential police perjury, a matter of inherent public concern. As to context and form, Ceballos properly reported his concerns to his superiors and sought direction concerning the content and form of disclosures about such misconduct that should be presented outside the Office.

According to Petitioners, however, Ceballos's speech was not protected because it was not "citizen" speech. Petitioners further reason that it was not citizen speech because it was instead "employee" speech. *See* Pet. Br. 24.[10] This supposed dichotomy between "citizen" speech and "employee" speech has not been drawn in this Court's previous cases and should be rejected because it cannot meaningfully be applied in many contexts.

Petitioners' mechanical division between citizen speech on the one hand and employee speech on the other is arbitrary and unadministrable for two principal reasons. First, individuals can speak simultaneously as employees and as citizens. Second, Petitioners' *per se* rule does not account for speech that is not uttered in response to particular job duties, but rather arises from a desire to comply with legal obligations that exist separate and apart from one's job duties.

As the United States acknowledges, citizen speech may be "related or unrelated to the employee's job" and "communicated in or out of the workplace." U.S. Br. 18. Once it has been determined that the speech in question is not purely personal and does not further a mere personnel grievance, Petitioners' focus on "job duties" does little to elucidate whether or not the speech is uttered as a citizen. The Ninth Circuit rightly observed that "many public employees *do* have a personal stake in ensuring that events surrounding their employment comport with the public interest .... For such employees, promoting the public good

[10] Petitioners refer to employee speech as, alternatively, speech "engaged in during the normal course and scope of employment, in accordance with the normal duties of employment" (*id.* at 27) and "purely routine, job-required speech" (*id.* at 25).

is a deeply personal mission." Pet. App. 13 n.5. Ceballos presented evidence that he was motivated by such concerns.[11] When employees report wrongdoing to their superiors or otherwise, they speak as civic-minded individuals and also on behalf of the public. Their speech should therefore be protected as "citizen" speech.

In addition, when public employees are subject to legal or ethical rules, they have an individual interest in complying with those laws or rules. Lawyers in general, and prosecutors in particular, are subject to many such requirements. For example, most state bar licensing regimes, including California's, prohibit lawyers from engaging in dishonest activity and presenting false testimony. *See, e.g.*, Cal. Bus. & Prof. Code § 6068 ("It is the duty of any attorney ... (d) to employ ... those means only as are consistent with the truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of factor or law."); *id.* § 6128(a) (misdemeanor if attorney consents to deceit or collusion, with intent to deceive court or any party); Rules of Prof. Conduct of the State Bar of Cal. 5-200 ("In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth ...."), *available at* http://calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158. This includes a responsibility to disclose any concealed facts that would make testimony otherwise misleading. *In the Matter of Jeffers*, 3 Cal. State Bar Ct. Rptr. 211, 220 (1994) ("It is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline." (internal quota-

[11] For example, after Najera threatened Ceballos with retaliation if he testified truthfully, he decided that he must still do so, no matter what the consequences might be for him personally. JA 59. At his deposition, Ceballos explained that he felt that Najera and Sundstedt should have explained to the Sheriff's Department that his only motivation in challenging the affidavit was to be ethical. JA 53.

tions omitted)). Moreover, the Rules of Professional Conduct provide that:

> A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

Rules of Prof. Conduct of the State Bar of Cal. 5-110, *available at* http://calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158.

In addition to these state ethical rules are special obligations of prosecutors imposed by the federal Constitution. As this Court noted in *Berger* v. *United States*, 295 U.S. 78, 88 (1935), the prosecutor's "interest, therefore, in a criminal prosecution is not that [the government] shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer." *See also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 695-696 (1987). *Brady* v. *Maryland*, 373 U.S. 83 (1963), elucidates one component of those special obligations—requiring disclosure of exculpatory evidence known by the government to the defense.[12] Courts rightly hold that exculpatory evidence, wherever it might be located or known within a prosecutor's office, must be disclosed to

[12] The California Penal Code likewise provides that "[t]he prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies ... (e) Any exculpatory evidence." Cal. Penal Code § 1054.1.

the defense; in essence, holding the office as a whole responsible for compliance. But this collective responsibility does not obviate the individual duty of a prosecutor who knows of exculpatory information subject to *Brady* to disclose that information where the office has not otherwise done so, whether for innocent or malevolent reasons.[13] Indeed, this individual responsibility is confirmed by the District Attorney's Office Protocols as enacted following the issuance of the Rampart Report that advise that "[c]omplying with *Brady* is the *individual responsibility of each deputy*." Special Directive 02-08 (Dec. 7, 2002), *available at* http://da.co.la.ca.us/sd02-08.htm (emphasis added).[14]

Prosecutors like other lawyers, will usually desire personally to comply with their professional and legal obligations as individuals, independently of any request from their supervisors. Moreover, violations of the state's professional conduct rules carry sanctions that are imposed on the licensed attorney personally—not on the office for which he or

[13] *See, e.g.*, Model Rules of Prof. Conduct § 5.2 ("Responsibilities of a Subordinate Lawyer"), cmt. 1 ("a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor"), cmt. 2 ("If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it."), *available at* http://www.abanet.org/cpr/mrpc/rule_5_2.html.

[14] This is not to say that an individual prosecutor has the unfettered authority to disobey orders *not* to disclose information based on a determination by his superiors that such information does not constitute exculpatory information under *Brady*. If the matter were one on which reasonable minds could differ, the subordinate attorney might not receive First Amendment protection in the event he disclosed information contrary to orders on the ground that his actions intruded upon the public employer's right to manage the government's position in litigation. On the other hand, if the *Brady* duty were ambiguous, and the prosecutor in good faith felt a need to obtain assurance that he had satisfied his own ethical duties, he ought to be able to speak with the protection of the First Amendment. To assure that protection, he would need to make the disclosure in a manner that would minimize office disruption (by, for instance, obtaining a confidential advisory opinion from the state bar, or submitting a request to the Court *in camera*, or otherwise seeking permission for his disclosures to the defense or court before making them).

she works. Cal. Bus. & Prof. Code § 6077 (authorizing sanction of public or private reproval or suspension from practice for willful breach of Rules of Professional Conduct); *id.* § 6128 (offense punishable by imprisonment in county jail not exceeding six months and/or fine of not more than $2500). Judge O'Scannlain, therefore, was wrong to conclude that "Ceballos had no *personal* stake (other than in doing his job well) . . . in the speech for which he now seeks protection." Pet. App. 42.

When prosecutors perceive, as Mr. Ceballos did, that these various ethical and constitutional obligations require them to raise concerns with supervisors, seek permission through appropriate channels to disclose certain information to the defense (which Ceballos obtained), or testify truthfully about facts learned or opinions held if subpoenaed in their individual capacity, they are not speaking on behalf of the government.[15] They are speaking on behalf of the public they have been entrusted to protect and on behalf of themselves, as professionally licensed attorneys who have taken an oath to uphold the State Bar Code and other applicable public laws. Prosecutors' speech should therefore be treated as "citizen" speech when they investigate or report misconduct in good faith, pursuant to an objectively reasonable belief that the constitution, state or federal laws, or ethical rules require them to do so.

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[15] One *amicus* argues that Ceballos was mistaken in his belief that *Brady* required disclosure. Nat'l Ass'n of Counties Br. 15 n.8. Whether disclosure was, in fact, required by *Brady* is not before the Court. Moreover, it is not germane to whether Respondent was speaking as a citizen on a matter of public concern, where he indisputably had a reasonable, good faith belief (supported by the views of others in his office who agreed with production of the redacted memorandum to the defense) that *Brady* required such disclosure. Indeed, even the district court that granted summary judgment to Petitioners did not question the *Brady* obligation, noting that *Brady* obligations can be triggered based on memoranda prepared by the government concerning the integrity of a witness. Pet. App. 64.

Petitioners' focus on job duties has historically been, and is more appropriately, considered under the part of the constitutional balancing test that evaluates the employer's interest in managing the workplace when an employee's speech on a matter of public concern intrudes on the effective functioning of the agency. When a court could determine as a matter of law that the employee's speech on matters of public concern impeded the effective performance of the employee's or others' job duties, by reflecting incompetent job performance or insubordination, or otherwise undermining workplace relationships that depend upon special trust, the employer is free to discipline the employee for such speech without running afoul of the First Amendment. *Amici* do not here support a constitutional rule that would prevent public employers from disciplining prosecutors who deliberately or recklessly make unfounded allegations of misconduct or who disregard office policies and procedures (when such policies are in place) for handling client confidences and resolving inter-office disputes. Nor do they suggest that prosecutors who offer interpretations of *Brady* or other ethical responsibilities that are objectively unreasonable so as to rise to the level of incompetent performance are insulated from recrimination. These cases will undoubtedly be resolved in favor of the employer as a matter of law before the employer is required to stand trial. Indeed, such matters could likely be resolved in a summary judgment motion presented on the basis of employer affidavits, before plaintiff's discovery has run its course.

Petitioners' *per se* rule, on the other hand, will necessarily exclude from constitutional protection certain speech of high public value and low workplace intrusion. For instance, the rule offers no protection to line prosecutors who disclose to a Court that their supervisors had instructed them not to disclose DNA evidence excluding the possibility that a defendant committed the crime. Or to prosecutors who blow the whistle when they are instructed to dismiss a case be-

cause the defendant is the Mayor's son.[16] Or to a second chair prosecutor who reveals a private admission by the lead prosecutor that he struck every single African American juror from the panel not for the race-neutral reasons he offered to the court, but because "Black people won't convict." Each of these examples would involve speech rendered pursuant to the prosecutor's job duties—but undoubtedly involve a matter of public concern. Governments' attempts to silence legitimate debate about such matters cannot be countenanced under the First Amendment.[17]

[16] This is a variant of the facts presented in *Connick*, involving a questionnaire inquiring whether the office exerted political pressure on prosecutors. There, the Court held that the speech was on a matter of public concern, but was outweighed by the office disruption caused in light of the defendant's motives. What if Myers instead had complained that in a particular case she was prosecuting, her supervisors brought improper political pressure to bear? Petitioners' rule would give that speech *less* protection (because it directly arose out of her prosecution of a case) by relieving the employer of any burden of showing that the speech disrupted the workplace. That makes no sense.

[17] *Pickering* and *Connick* both provide that the employee's interest in free speech is balanced against "the interest of the State . . . in promoting the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568; *see also Connick*, 391 U.S. at 154. The interest in "promoting the efficiency of the public services" may itself be *advanced* by early disclosure of government misconduct. The Rampart Scandal cost the City of Los Angeles more than $70 million in civil settlements alone. Andrew Blankstein, *Jury Awards $6.5 Million in Frame-Up: Public Defender for a Man Falsely Imprisoned and Shot by Rampart Officers Should Have Uncovered the Police Misconduct, Panel Finds*, L.A. Times, May 26, 2005, at B3. It further "undermined the credibility" of law enforcement authorities in Los Angeles with "dire consequences to effective law enforcement and the successful prosecution of crimes." Rampart Independent Review Panel Report 2. These incredible costs, which arose from institutional pathologies that had gone too-long uncovered, indicate that a well-functioning and transparent culture that promotes the prompt reporting of malfeasance may be a necessary tool for the promotion of government efficiency.

II. EVEN IF THE COURT INCORPORATES "ROUTINE JOB REQUIREMENTS" AS PART OF A FUNCTIONAL DEFINITION OF PRESUMPTIVELY PROTECTED SPEECH, IT SHOULD NOT ADOPT PETITIONERS' VERSION OF WHAT WAS REQUIRED OR ROUTINE IN THIS CASE

According to Petitioners, notwithstanding the public's interest in police misconduct, preparation of the memorandum was merely "routine, job-required speech" and therefore unprotected. Pet. Br. 31-32. In fact, Ceballos's speech was neither required by his job nor routine.

Admittedly, Ceballos undertook his investigation and reported his findings and recommendations to his superiors orally and in a memorandum pursuant to his duties as a prosecutor in the sense that the matters that he described arose out of a case under his supervision. But to construe job requirements for this purpose in a manner that sweeps in the performance of every discretionary function generally related to an employee's core job description, without pointing to specific assigned duties or instructions from supervisors would be overbroad. Writing reports about suspected police perjury was not an ordinary part of the duties of calendar deputies then or now. As a calendar deputy, Ceballos supervised (and handled certain aspects of) prosecutions of public offenses generally—in the *Cuskey* case, allegations of narcotics and weapons crimes. He did not operate as an inspector general and was not charged generally with investigating law enforcement officers or prosecuting cases of police misconduct.[18] Moreover, the proffer of testimony he

[18] For this reason, Cebalios's job duties were unlike those of the plaintiff in *Gonzales* v. *Chicago*, 239 F.3d 939 (7th Cir. 2001). In *Gonzales*, a police officer alleged that he was terminated in retaliation for reports he had written in his prior position as an investigator at the Office of Professional Standards. The Seventh Circuit held that these reports did not address a matter of public concern because they had been created in the scope of his ordinary job responsibilities.

Here, Ceballos's job was not to report on police misconduct. His situation is therefore similar to the plaintiff in *Delgado* v. *Jones*, 282 F.3d 511 (7th Cir. 2002), *cert. denied*, 125 S. Ct. 346 (2004). In *Delgado*, a police

would offer in response to a subpoena commanding him to appear in his individual capacity, or testimony actually offered pursuant to such subpoena, could not in any way be construed as speech pursuant to his job duties (particularly since he had by then been relieved of duty in supervising the case).

If investigating and exposing police misconduct were a regular part of a calendar deputy's job as defined by the District Attorney's Office, one would expect that it would have had related policies and procedures in place. In fact, the Office was specifically criticized after Rampart for its lack of policies regarding this very type of situation. *See* Chemerinsky Report, 34 Loy. L.A. L. Rev. at 633-634 (observing that prosecutors in Los Angeles "have no effective mechanism to report police perjury and misconduct" and recommending that the District Attorney's Office develop such policies).[19] The Office's Legal Policies Manual was likewise silent on the topic of police misconduct. *See generally* L.A. County Dist. Attorney's Office, Legal Policies Manual (1998).[20]

In November 2001 (after the events in this case), the District Attorney's Office released three written policies in response to the Rampart police scandal, including Special Directive 01-10 that for the first time provided guidance to prosecutors who become aware of police misconduct. *See* Special Directive 01-10 (Nov. 7, 2001), *available at*

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detective alleged that he was retaliated against for his investigation into alleged criminal activities involving a close relative of a public official. The Seventh Circuit held that the plaintiff stated a valid First Amendment claim even though his job was generally to arrest persons found to have broken the law. The court distinguished *Gonzales* by noting that the holding of that case was "limited to routine discharge of assigned functions, where there is no suggestion of public motivation." *Id.* at 519.

[19] At the time, the Office had no explicit policies defining prosecutors' *Brady* obligations either. Chemerinsky Report, 34 Loy. L.A. L. Rev. at 632-633.

[20] This outdated version of the Manual is not in the record or available on the District Attorney's current website. *Amici* will lodge this Manual with the Court should the Court so request.

http://da.co.la.ca.us/pdf/referrals.pdf.[21] The Office acknowledges on its web site that "[n]ever before in the 151-year history of the District Attorney's Office ha[d] that office issued written protocols which outline how, when and under what circumstances prosecutors will investigate allegations of criminal misconduct by law enforcement employees." *See* http://da.co.la.ca.us/restoring.htm. Thus, when Ceballos had to decide what to do about his suspicions in the *Cuskey* matter, he acted in a policy vacuum. According to Ceballos, even Sundstedt was unsure how to handle the situation and said that he had never come across this situation in his more than 25 years with the office. JA 80. Under these circumstances, the writing of the memorandum cannot fairly be described as an ordinary or routine part of Ceballos's job duties.

Petitioners also rely on the fact that prosecutors in Los Angeles County regularly complete "disposition reports" in support of the argument that Ceballos's memorandum was simply routine job-required speech. The district court likewise concluded that because prosecutors commonly prepare disposition reports, preparing a memorandum specifically about possibly perjured police testimony was "part of Ceballos's job." Pet. App. 63-64. However, as explained below, the memorandum was not an ordinary disposition report.

Deputy district attorneys do routinely fill out disposition report forms, after a decision has already been made by their superiors to dismiss a case because of, *inter alia*, acquittal by a jury or an adverse ruling by a judge at a sup-

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[21] Pursuant to Special Directive 01-10, deputy district attorneys who become aware of possible criminal misconduct by any member of the justice system during the pendency of a case are to "prepare a memorandum detailing information and/or evidence suggesting possible criminal misconduct." *Id.* The memorandum is to be forwarded through the Head Deputy or Deputy-in Charge to the Head Deputy of the Justice System Integrity Division ("JSID"). The "Head Deputy or Deputy-in-Charge shall also prepare a separate memorandum setting forth an analysis of the alleged misconduct" and then forward both memoranda to the JSID. *Id.*

pression hearing. Typically, a one-page form is used,[22] but sometimes a prosecutor will write a supplementary memorandum explaining his recommendation of a particular disposition. Only if the recommendation is accepted does it become the basis for the disposition of the case, and the memorandum then becomes part of the disposition report.[23]

That Ceballos wrote some kind of memorandum in connection with the *Cuskey* case was not unusual. However, the content of his recommendation, his request that the *Cuskey* case be dismissed on the basis of police dishonesty, was highly unusual. It was a request for an extraordinary disposition—not only did it recommend *sua sponte* dismissal by the District Attorney prior to resolution of a pending motion to traverse, it also recommended the vacatur of a sentence already imposed on a co-defendant *who had pled guilty*. JA 496. The Ninth Circuit observed that "a report that would ordinarily be considered routine by virtue of its form may well become non-routine by virtue of its content, such as when it contains serious charges of official wrongdoing." Pet. App. 17. That is what happened here. Typically the practice of the Los Angeles County District Attorney's Office has been that questions about the credibility of police have been left to judges (and juries) to decide. *See* Chemerinsky Report, 34 Loy. L.A. L. Rev. at 635 (finding "tension over whether it is part of the prosecutor's role to evaluate witness credibility, including that of police officers"). Here, Sundstedt wanted to proceed by allowing the hearing on the search warrant to go forward, leaving it to the judge to decide whether to suppress the evidence. Pet. App. 54. Ceballos disagreed because he felt that, as prosecutors, they had an obligation not to let the case go forward because the evidence had been seized illegally. JA 47 ("We have to make an independent decision as to whether or not to go forward with the case. We just don't throw cases in front of judges and juries just because. We're here for a purpose.").

[22] This form is Appendix A-1 to Chapter 6 of the Legal Policies Manual, *supra*, at 23 & n.20.

[23] *See* JA 41 ("The disposition report always must go to the head deputies because they have to sign off on it."). Ceballos intended the March 2, 2000 Memorandum to serve as the disposition report in the event that his recommendation to dismiss the case had been accepted. JA 40 ("It basically was the disposition report, or was going to be the disposition report for dismissing the case."). Because his recommendation was not adopted, the Memorandum did not become part of a disposition report.

Ceballos's recommendations that the case be dismissed without a hearing challenged entrenched institutional inertia within the Office concerning how to handle suspected police misconduct. His vigorous appeals to his supervisors and the Sheriff's Department to express his good faith belief that a defendant awaiting trial had been indicted on the basis of demonstrably false evidence were motivated by a concern with the public interest and did not disregard any office instruction or policy. This speech, which indisputably involved matters of public concern, prompted just the sort of private and public debate that one would want to occur—among prosecutors at various levels within the office, in a dialogue with the Sheriff's Department, and ultimately in an evidentiary hearing. Adopting the rule proposed by Petitioners in this case would make such healthy and important interchange significantly less likely to occur.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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